(5)

No. 00-359

Supreme Court, U.S.
FILED
NOV 20 2000

IN THE

Supreme Court of the United States

LOCAL UNION 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

and

LOCAL UNION 148, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103
(314) 621-2626

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105
(312) 727-1015

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) ..... *passim*
Frazier Indus. Co. v. NLRB, 213 F.3d 750 (D.C. Cir. 2000) 6
Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) 4
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 5, 6
Movers & Warehousemen's Ass'n v. NLRB, 550 F.2d 962 (4th Cir. 1977) 3
NLRB v. Brown Food Store, 380 U.S. 278 (1965) ..... *passim*
NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) 6, 7
Riverside Cement Co., 296 N.L.R.B. 840 (1989) 8
Traction Wholesale Ctr. Co. v. NLRB, 216 F.3d 92 (D.C. Cir. 2000) 6

STATUTES

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 7, 29 U.S.C. 157 ..... *passim*
§ 8(a)(1), 29 U.S.C. 158(a)(1) ..... *passim*
§ 8(a)(3), 29 U.S.C. 158(a)(3) ..... *passim*

OTHER

American Heritage Dictionary of the English Language (4th ed. 2000) 5
Black's Law Dictionary (6th ed. 1990) 5
Bryan A. Garner, *Dictionary of Modern Legal Usage* (1985) 5
Webster's Third International Dictionary (1986) 5

REPLY BRIEF FOR PETITIONERS

Testing the limits of Joe Louis' boxing axiom—"He can run but he can't hide"—the National Labor Relations Board's ("NLRB's"), and the Central Illinois Public Service Company's ("CIPS,"), Briefs in Opposition go to great lengths *not* to engage the Question Presented by our *certiorari* petition.

Both opposition briefs stake out the claim that the NLRB and the D.C. Circuit limited themselves to deciding a quite different—and legally banal—employer lockout question; that this case thus presents that well-defined, well-settled question; and that it follows *a fortiori* that there is no basis for a *certiorari* grant here. As their means of perfecting that claim, both opposition briefs proceed by eliding the NLRB's basic, independent, and dispositive ruling in this case—affirmed by the Court of Appeals as such—*viz.*, by eliding the very ruling the *certiorari* petition addresses and requests the Court to consider.

Given how little of substance Respondents have to call on, we cannot fault them for lacking the courage of their convictions. But as we now show, the fact of the matter is that both the Board and the Court of Appeals *did* decide the important and unsettled Question Presented in our *certiorari* petition, that the Board and the court below did so wrongly, and that their error calls for this Court's correction.

1. The gist of the NLRB Opposition Brief is that this case, as decided by the Board and the Court of Appeals, is a case involving a "bargaining lockout"—a lockout to secure a collective bargaining agreement on the employer's terms—on all fours with *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and as such "is governed by the Court's holding in *American Ship Building Co.* that a lockout designed 'merely to bring about a settlement of a labor dispute on favorable terms' is not an unfair labor practice." NLRB Opp. Br. 9-10 (quoting 380 U.S. at 313). According to that brief:

> The Board did not "privileg[e] employer lockouts in reprisal for employee protected, concerted activity." Rather, the Board, affirmed by the court of appeals, found that CIPS locked out its employees (1) to neutralize the unions' economic weapon in the contract negotiations, and (2) to resolve the contract issues that were dividing the parties. The lockout was "in opposition to the Unions' bargaining position," not in opposition the employees' right to engage in protected Section 7 activity. [NLRB Opp. Brief at 10 (citations omitted).]

The premise of this syllogism is false in that this statement of what the Board found and what the Board held cannot be squared with what the Board in fact found and what the Board in fact held in its basic, independent, and dispositive first ruling herein. As the Court of Appeals stated: "*The Board . . . expressly accepted the ALJ's finding that the lockout was implemented 'in reprisal' for the inside game . . . .*" Pet. App. 12a (citing Pet. App. 85a (ALJ Opinion), 19a (NLRB Opinion)) (emphasis added). And, to quote the Court of Appeals again, the first of the Board's two independent rulings in this case holds that this reprisal motive is "not . . . impermissible." Pet. App. 12a.[1] In that regard, the Board

---

[1] In its second ruling, the Board went on to hold that CIPS had a second objective—"resolution of the issues that were dividing the parties in their bargaining negotiations," and that, under *American Ship* and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965), this was plainly a lawful objective. Pet. App. 26a. The Court of Appeals affirmed this Board ruling as well. Pet. App. 9a, 13a.

In our view, the Board's second ruling rests on an erroneous determination of fact—*viz.*, that CIPS had any such "bargaining resolution" motive for the lockout. But because the Board applied the correct legal rule under *American Ship* and *Brown Food* to this erroneous finding, this case-specific factual error does not reach beyond the instant dispute, and we have thus acknowledged that this ruling is not a meet subject for this Court's review. *See* Pet. 9-10 n.6.

stated "even assuming as true that the sole objective of the lockout was to force the Unions to cease their inside game activities, such is not an impermissible business objective." Pet. App. 25a. The Court of Appeals in its turn affirmed the Board's ruling as "reasonable." Pet. App. 8a.

It could not be more plain, then, that the Board's first ruling here is—contrary to the NLRB Opposition Brief—a ruling "privileg[ing] employer lockouts in reprisal for employee protected, concerted activity." NLRB Opp. Br. 10.[2] At the risk of undue repetition, that ruling most certainly raises the Question Presented in the *certiorari* petition: "Whether there is an exception—privileging employer lockouts in reprisal for employee protected, concerted activity and with the object of forcing the employees to cease such activities—to the basic National Labor Relations Act antidiscrimination principles . . .?" Pet. (i).

And, to close the circle, the Board's first ruling here is in no way the same as this Court's ruling in *American Ship* that an employer lockout "for the *sole* purpose of bringing economic pressure to bear in support of [the employer's] bargaining position" is lawful. 380 U.S. at 318 (emphasis

---

This second holding does *not*, however, rescue—or obviate review of—the first holding: "[E]ven if a lockout is motivated in part by the wish to exert economic pressure for the lawful purpose of supporting a legitimate bargaining position, the lockout is nevertheless unlawful if also motivated by an intent to interfere with" protected rights. *Movers & Warehousemen's Ass'n v. NLRB*, 550 F.2d 962, 966 (4th Cir. 1977).

[2] The NLRB Opposition Brief, at 11-13, would distinguish the §§ 8(a)(1) and (3) cases we cited in the *certiorari* petition solely on this same erroneous basis: "Because the Board determined that CIPS did not act with an antiunion motive" and because "the Board found in this case that CIPS's lockout was not a 'reprisal,' but rather an economic weapon used in support of CIPS's bargaining position and in opposition to the unions' chosen economic weapon." NLRB Opp. Br. 11, 12.

That effort fails because, as shown in the text, the Board's first ruling here *is* addressed to a reprisal lockout not a bargaining lockout.

added). Nor, as we explained in our *certiorari* petition at pp. 20-24—an explanation nowhere controverted in the NLRB Opposition Brief—does the holding of *American Ship* or that of *Brown Food*, justify the result here.

Simply put, the Court's decisions recognize a carefully delineated privilege—that parallels the employees' "bargaining strike" privilege—allowing an employer to advance its economic interests in the collective bargaining process by locking out its employees for the sole purpose of supporting the employer's bargaining position. And, in so doing, neither decision sanctions an employer lockout in reprisal for employee protected, concerted activity and with the purpose of forcing employees to cease that activity. To the contrary, in concluding that the lockout in *Brown Food*—instituted to preserve the integrity of a multi-employer bargaining unit in anticipation of a whipsaw strike—was lawful, this Court stressed that there was no evidence that the employer "acted . . . in reprisal for the whipsaw strike." 380 U.S. at 282. *See also American Ship*, 380 U.S. at 313 (Employer "measures taken to discourage participation in protected union activities may be found to come within the proscription" of § 8(a)(3)). [3]

---

[3] As *Brown Food* indicates, the Board places more weight on *dicta* from this Court's decision in *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), than it can possibly bear. NLRB Opp. Br. 11.

Machinists held that federal labor law preempts a State order enjoining a union and its members from engaging in a "partial strike" by refusing overtime, where this tactic was implemented during contract negotiations and in tandem with a strike authorization. *See* 427 U.S. at 134, 155. In making that determination, the majority opinion made the passing statement relied upon by the Board: "even were the activity presented in the instant case 'protected' activity . . . economic weapons were available to counter the Union's refusal to work overtime." 427 U.S. at 152-53 (citing *American Ship*).

2. For its part, CIPS' Opposition Brief endeavors to neuter the Question Presented here by cleansing the Board's ruling of the finding that the CIPS lockout was a "reprisal" for the locked-out employees' protected, concerted "inside game" activities.

CIPS urges that "[t]he word 'reprisal' can have two meanings," one of which denotes "hostility to the Unions and a desire to punish them," and the other of which simply means "'in response to,' which is clearly what the NLRB *meant* to find." CIPS Opp. Br. 12 (emphasis added). "Reprisal," according to the standard authorities, is: "In general, any action taken by one person either in spite or as a retaliation for an assumed or real wrong by another." *Black's Law Dictionary* (6th ed. 1990).[4] We have found no authority—either linguistic or legal—for CIPS' novel, putatively innocuous, understanding of that term.

Be that as it may, it is also to the point that the more forthright locution "in reprisal for" (as adopted in the decisions below) and CIPS' proffered euphemism "in response to" are one and the same for the purposes of the NLRA anti-discrimination regime. As we have previously detailed, NLRA §§ 8(a)(1) and (3) prohibit an employer from "discriminati[ng] against employees who participate in concerted activities protected by § 7 of the Act," *Metropolitan*

Fairly read, the *Machinists dicta* suggests that, in a case where a strike was authorized and the union also instituted a "partial strike" through an overtime ban, an employer may institute a properly motivated "bargaining lockout" designed to secure a collective bargaining agreement on the employer's terms. Indeed, given the limited "bargaining lockout" privilege recognized in *American Ship*, the *Machinists* Court's citation to that decision all but demands this reading.

[4] *See also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995) ("*Reprisal*" is "an act of retaliation"); *Webster's Third International Dictionary* (1986) (same); *American Heritage Dictionary of the English Language* (4th ed. 2000)("Retaliation for an injury with the intent of inflicting at least as much injury in return.").

Edison Co. v. NLRB, 460 U.S. 693, 703 (1983), "which includes *discouraging participation in concerted activities*," *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963)(emphasis added). Because the Board ruled that an objective of the lockout "was to force the Unions to cease" their protected, concerted activities, Pet. App. 25a—which more than qualifies as an intent to "discourag[e] participation in concerted activities"—either the descriptive label "in reprisal for" or the label "in response to" affixed to this motive is sufficient to make the legal point.

Hence, even accepting CIPS' locution, a showing that an employer takes adverse employment action—such as the lockout here—"in response to" employee protected, concerted activity—such as the "work-to-rule" activity here—makes out a §§ 8(a)(1) and (3) unfair labor practice. *See Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (*prima facie* violation of §§ 8(a)(1) and (3) is made out on a showing that " 'protected activity was a motivating factor in the adverse employment decision' ") (quoting *Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 755 (D.C. Cir. 2000)).

3. In their one feint at the Question Presented—which carefully avoids the substance of the NLRA §§ 8(a)(1) and (3) anti-discrimination regime—the Respondents play a word game: In well-settled NLRA terms an adverse employer action (in the form of, *e.g.*, a lockout or a temporary layoff) in reprisal for employees' protected concerted activities (in the form of "work-to-rule" activities) is a plain §§ 8(a)(1) and (3) unfair labor practice. The opposition briefs—following what the Board dissent properly characterized as the Board majority's "facile logic" that "bootstraps" its conclusion—would have it that calling the work-to-rule activities and the reprisal lockout here "economic weapons" the parties have arrayed against each other, transforms what is in substance an unfair labor practice into privileged employer conduct. *See*

NLRB Opp. Br. 10-12; CIPS Opp. Br. 4-6, 9-11; Pet. App. 28a (NLRB Decision); Pet. App. 56a n. 14 (NLRB Dissent).

CIPS, in particular, gives pride of place to the "economic weapon" label: "Because the Unions were using the inside game as an economic weapon to force CIPS to accede to their bargaining position, CIPS was entitled to respond with its own economic weapons." CIPS Opp. Br. 6. This talismanic use of the term "economic weapon" and the accompanying warfare analogies do nothing to explain why the otherwise applicable §§ 8(a)(1) and (3) prohibitions do not apply here. Rather, it is emotive rhetoric for the proposition that the NLRA privileges any and all employer lockouts in reprisal for any and all employee protected, concerted activity in support of the employees' bargaining position. But nothing in the Act, nothing in any prior decisions of the Board, and nothing in the prior decisions of this Court provides any basis for that proposition.

Indeed, while it is fair enough to say that the NLRA contemplates "economic warfare," it is equally fair to say that the Act—in §§ 7 and 8—states certain Geneva Convention rules of economic warfare. The most basic of these is that adverse employer action designed to "discourag[e] participation in concerted activities" is a §§ 8(a)(1) and (3) unfair labor practice. *Erie Resistor*, 373 U.S. at 233. And, the heart of the matter here is that the Board's reprisal lockout holding works a qualitative diminution of the NLRA anti-discrimination regime and a corresponding qualitative expansion of the bargaining-lockout privilege—and does so without any warrant.

On the theory of the decisions below, a reprisal lockout instituted to defeat protected, concerted activities is *ipso facto* a lawful "economic weapon," so long as the employees' protected activities are in support of their bargaining position. As the Board dissent rightly pointed out, this reasoning is not just contrary to the basic precepts of the NLRA anti-

discrimination regime; it "deal[s] an obvious blow to those exercising Section 7 rights." Pet. App. 43a.

Under the Board's holding, an employer would be privileged to utilize the reprisal lockout weapon simply and solely to defeat employees' exercise of their rights to, for instance, distribute handbills, wear union insignia, or hold rallies in support of their position in bargaining. As Member Liebman observed, this "would allow an employer to respond to any protected activities in support of a union's bargaining position by locking out its employees, whether or not the employer had a specific legitimate business justification, simply because there was an ongoing bargaining dispute." Pet. App. 62a n.24.[5]

* * *

The sum of the foregoing is that the opposition briefs are studies in evasion. We therefore believe it proper to conclude by refocusing this proceeding on what it is really about. To do so we note that in our *certiorari* petition we stated, and

---

[5] It is no answer to say—as CIPS does—that a bargaining lockout that is instituted in anticipation of a strike is lawful. *See* CIPS Opp. Br. 9. First of all, *Brown Food* strongly suggests that a lockout "in reprisal for" anticipated strike activity is unlawful. 380 U.S. at 282. Beyond that, the employees here voted *not* to strike, and the ALJ specifically found that the employees did not engage in a "partial strike" or in any unreasonable "work-to-rule" practices. Pet. App. 169a-170a. The Board did not disturb these findings. Hence, the employees here, like the employees in *Riverside Cement Co.*, 296 NLRB 840, 842 (1989), "were at all times willing and available to work under the terms of the contract . . . ." And, here, just as in *Riverside Cement*:

> The Respondent's actions [in locking out the employees] were taken in response to the employees' decision through the Union to invoke the terms of [the operative collective bargaining agreement provisions]. As such, the Respondent engaged in retaliation for the protected concerted activity engaged in by the employees. Accordingly . . . Respondent violated Section 8(a)(3) and (1) of the Act. [*Id.* (footnote omitted)]

then elaborated on, the following reasons for granting *certiorari* here:

- The decisions below essay a radical break with prior law by legitimizing lockouts in reprisal for NLRA § 7 protected, concerted activity. Given the force of the employer lockout and the importance of the NLRA's legal protections for § 7 activity in realizing the Act's aims, this is a change in the law of the most profound consequence.
- The decisions below, moreover, are contrary to the long line of Board and court authority holding that employer reprisals against employees' protected, concerted activity are a § 8(a)(3) unfair labor practice.
- The reprisal-lockout question of first impression presented here, like its bargaining-lockout predecessors in this Court, is a complex question that goes to the Act's very essence. And, as *American Ship* and *Brown Food* show, the complexities involved in placing the lockout in its proper place in the Act's statutory scheme have proved sufficiently daunting as to require this Court's intervention to maintain the integrity of that scheme.
- Here, as in *American Ship* and *Brown Food*, the Board and the Court of Appeals have gotten things wrong, this time with regard to employee lockouts in reprisal against employee § 7-protected concerted activity. What is more, the Board and the Court of Appeals have gotten things wrong by misreading this Court's *American Ship* and *Brown Food* decisions to go beyond validating bargaining lockouts. The decision below, by extending the bargaining lockout privilege to reprisal lockouts distorts both the Act's protection of employee § 7 rights and the Act's preference for free collective bargaining as a means of mediating conflicting employer and employee *economic interests*, which presupposes those rights and their protection.

The long and the short of it is that the Opposition Briefs do not even come close to rebutting any of these points. That

being so, we submit that the ultimate point we made in our *certiorari* petition holds:

• By reason of the Act's enforcement scheme, unless *certiorari* is granted here the Board's first words privileging employer reprisal lockout will be the authoritative last words on the legality of such lockouts. That being so—and given the nature and magnitude of the Board's error, its destructive impact on § 7 rights as well as its equally destructive impact on the structure of the NLRA legislative scheme—this reprisal-lockout case, like its predecessor bargaining-lockout cases, urgently calls for this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our *certiorari* petition, the petition should be granted.

Respectfully submitted,

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103
(314) 621-2626

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105
(312) 727-1015

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

Counsel for Petitioner